

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-72

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Odessa and Los Ybanez, Texas)

RM-8479

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 1, 1995;

Released: March 10, 1995

By the Chief, Allocations Branch:

1. At the request of Ruben Velasquez ("petitioner"), permittee of Station KADM(FM), Channel 299C2, Odessa, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3216 (1994), proposing the substitution of Channel 300C1 for Channel 299C2 at Odessa and modification of Station KADM(FM)'s construction permit to specify operation on the higher powered channel. In order to accommodate the upgrade at Odessa, an *Order to Show Cause* was issued to Israel Ybanez ("Ybanez"), licensee of Station KYMI(FM), Los Ybanez, Texas, proposing the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas, and modification of Station KYMI(FM)'s license to specify operation on the alternate Class C2 channel. Petitioner filed comments reiterating its intention to apply for Channel 300C1 and to reimburse the licensee of Station KYMI(FM) for the reasonable cost associated with the change in channel at Los Ybanez. Ybanez filed comments in response to the *Order to Show Cause*. New Frontier Communications, Inc. ("Frontier"), filed a counterproposal, as well as an errata to its comments and counterproposal.¹ Petitioner filed reply comments.

2. Ybanez, in response to the *Order to Show Cause*, opposes the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez and modification of his license for Station KYMI(FM). Ybanez states that Station KYMI(FM)'s present dial is uncluttered and by changing its position would create audience diversion. Secondly, he submits petitioner is already able to provide 70 dBu service to 74 percent of the Odessa land area and has been granted a waiver of the community coverage rule. Ybanez argues that the Commission by granting the waiver has concluded that

the public interest is served by the operation of KADM(FM) as authorized despite its slight shortfall in providing at least 80 percent coverage to Odessa. Furthermore, Ybanez believes that Odessa is a community which receives an abundance of services, noting that two Class C1 stations and one Class C are already allotted to the community. However, Ybanez states should the Commission ultimately determine that Channel 300C1 should be allotted to Odessa, he urges that petitioner be required to reimburse him for the costs associated with the change in channel. In this regard, Ybanez submits that the required reimbursement should cover the costs associated with his change in channel, including: legal, engineering, equipment, printing, promotion for the new frequency and miscellaneous expenses. He also states his willingness to cooperate with petitioner to come to an understanding as to reimbursable costs.

3. In reply comments, petitioner states that none of Ybanez reasons presented justifies denying petitioner's proposal to upgrade his facilities at Odessa. Petitioner argues that it is well settled that no licensee has a vested right in a particular channel, citing *Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990). Similarly, petitioner notes that the fact that the Commission granted KADM(FM) a waiver of the community coverage rule for its presently authorized facilities or that Odessa is served by other radio stations, is no basis for denying petitioner's proposal to improve his facilities. Finally, petitioner submits that he will reimburse Ybanez for the reasonable and prudent expenses associated with the change of channel at Los Ybanez, Texas.

4. After carefully reviewing the pleading before us, we believe the public interest would be served by substituting Channel 300C1 for Channel 299C2 at Odessa, Texas, and the substitution of Channel 253C2 for Channel 300C2 at Los Abase, Texas, since it could enable Station KADM(FM) to expand its coverage area. Further, we find Ybanez's opposition is not on point. The fact petitioner is licensed to a community which includes other radio stations and has received a waiver of the city grade coverage rules while licensed on Channel 299C2, does not diminish the benefits to be derived by upgrading its facilities. Grant of petitioner's proposal will enable Station KADM(FM) to improve its service to the public. As the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. See, e.g. *Marietta, Ohio*, and *Ravenswood, West Virginia*, 2 FCC Rcd 4681 (1987) and *Albany, New York et al.*, 2 FCC Rcd 4300 (1987), 3 FCC Rcd 4681 (1987).

5. With respect to the issue of reimbursement, Ybanez is generally concerned about the reimbursement of all his expenses for changing channels. Reimbursement of costs incurred by the affected station, both technical and promotional, is left to the good faith negotiation of the parties involved. Reimbursement of costs incurred by the affected station is governed by the guidelines set forth in *Circleville*,

¹ Frontier's counterproposal is unacceptable and was not placed on public notice. Frontier requested the substitution of Channel 250C for Channel 250C1 at Odessa, Texas. Our engineering review indicates that there is no technical conflict between the Odessa's upgrade and petitioner's proposal. Prior to the filing of its counterproposal, the Commission amended its Rules to permit upgrades of FM stations by a one-step applica-

tion process. See *FM Channel & Class Modification by Application*, 58 FR 38534, July 19, 1993. Therefore, if Frontier so chooses to pursue its upgrade, it must avail itself of the one-step application process. In addition, the pleading filed by Frontier as well as, responsive comments are moot and will not be discussed.

Ohio, 8 FCC Rcd 2d 159 (1967). In this instance, petitioner has acknowledge his responsibility to reimburse Ybanez for the reasonable costs associated with the change in frequency for Station KYMI(FM).

6. Channel 300C1 can be allotted to Odessa in compliance with the Commission's minimum distance requirements without the imposition of a site restriction.² Channel 253C2 can be allotted to Los Ybanez in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KYMI(FM)'s license.³ As requested, we will also modify Station KADM(FM) and Station KYMI(FM)'s authorizations to specify operation on Channel 300C1 and Channel 253C2, respectively. Additionally, since Odessa and Los Ybanez are located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained for these allotments.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective April 27, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Odessa, Texas	241C2, 245C1, 250C1, 256C, 300C1
Los Ybanez, Texas	253C2

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Ruben Velasquez, for Station KADM(FM), Odessa, Texas, IS MODIFIED to specify operation on Channel 300C1, in lieu of Channel 299C2, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Israel Ybanez, for Station KYMI(FM), Los Ybanez, IS MODIFIED to specify operation on Channel 253C2 in lieu of Channel 300C2, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KYMI(FM)'s license, BLH-910115KA, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-910115KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the licensee of Station KYMI(FM), as follows: Israel Ybanez, No. 15, Los Ybanez, Texas 79331.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ruben Velasquez, permittee of Station KADM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

² The coordinates for Channel 300C1 at Odessa, Texas, are North Latitude 31-51-30 and West Longitude 102-22-30.

³ The coordinates for Channel 253C2 at Los Ybanez are North Latitude 32-43-22 and West Longitude 102-01-50.